STATE OF MICHIGAN
IN THE SUPREME COURT

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC., DETROITERS WORKING FOR ENVIRONMENTAL JUSTICE, ORIGINAL UNITED CITIZENS OF SOUTHWEST DETROIT, and SIERRA CLUB,

Appellees,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY and DAN WYANT,

Appellants,

and

AK STEEL, INC.,

Appellant.
_____/

Supreme Court No. 154524

Court of Appeals No. 326485

Wayne County Circuit Court No. 14-00887-AA

REPLY BRIEF OF APPELLANT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

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ARGUMENT

I. The Court of Appeals' misinterpretation of Section 91(1) of the Administrative Procedures Act is the basis for its holding and is not simply dicta.

The ultimate issue in this case is whether SDEIA's appeal to circuit court of a permit DEQ issued was timely. The resolution of that issue depends, in turn, on which court rule applies to SDEIA's appeal: MCR 7.119, which provides that the claim of appeal must be filed within 60 days after DEQ issued the permit, or MCR 7.123, under which the claim of appeal must be filed within 21 days. SDEIA filed its appeal 59 days after DEQ issued the permit to Severstal Dearborn, LLC. (Ex 1, pp 1-2.)

To answer the question of which court rule applies, the Court of Appeals reviewed MCR 7.119(A), which states: "This rule governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq.* [i.e., the Administrative Procedures Act] applies." MCR 7.119(A). And to determine whether the APA "applies" to DEQ's permitting decision within the meaning of MCR 7.119(A), the Court of Appeals interpreted Section 91(1) of the APA.

Section 91(1) states the APA's provisions "governing a contested case apply" when "licensing is required to be preceded by notice and an opportunity for hearing." MCL 24.291(1). The Court of Appeals emphasized that there was notice and an opportunity for hearing on Severstal's permit application: "Indeed, notice was provided of the public comment period" and the "public hearing" at which people could provide comments in person on a draft version of the permit that DEQ

proposed to issue. (Ex 1, n 3.) Because DEQ provided notice and an opportunity for a public hearing on the permit application, the Court of Appeals reasoned "[t]hus, according to MCL 24.291(1), the provisions of the APA that relate to a contested case, i.e., Chapter 4 of the APA, apply." (*Id.,* p 7.) In other words, the Court of Appeals interpreted Section 91(1) to mean that the APA's provisions for contested cases (that is, the APA's provisions for *evidentiary hearings*) apply when an agency holds a *public hearing* on a proposed licensing decision. The Court of Appeals continued its analysis based on that misinterpretation of Section 91(1): "And because these provisions applied, that means that the APA applied to the decision to grant [the permit]. As a result, we hold that MCR 7.119 governs and that petitioners had 60 days to appeal the DEQ's issuance of the permit to the circuit court." (*Id.*)

SDEIA now attempts to wave away the Court of Appeals' misinterpretation of Section 91(1) as mere "dicta." (SDEIA Brief, p 10.) According to SDEIA, the Court of Appeals' misinterpretation is dicta because it goes "'beyond the facts before the court'" and does not "embody a determination of the specific case before the court.'" (*Id.*) (quoting *Lugo v Ameritech Corp*, 512, dissent n 1.)

SDEIA is wrong for two reasons. First, there is no dispute that the Court of Appeals relied on the public hearing DEQ held about the draft permit and also relied on the fact that no contested case occurred. Second, the public hearing on which the Court of Appeals relied is the underlying basis – indeed, the very foundation – for both (1) the Court of Appeals' erroneous determination that the

APA "applies" to DEQ's permitting decision within the meaning of MCR 7.119(A) and (2) its holdings that MCR 7.119 governs SDEIA's appeal to the circuit court and that SDEIA therefore had 60 days to file its claim of appeal. SDEIA's attempt to ignore the Court of Appeals' rationale as mere dicta should be rejected.

II. MCR 7.119 does not govern all appeals from agency licensing decisions; it governs appeals from agency licensing decisions after a contested case.

SDEIA maintains that its appeal is governed by MCR 7.119 because that rule "is intended to cover circuit court appeals of the decisions of APA-defined agencies." (SDEIA Brief, p 18.) According to SDEIA, MCR 7.119 governs appeals from "*all* decisions by APA agencies." (*Id*.) (emphasis added.)

If, as SDEIA claims, MCR 7.119 governs appeals of all agency decisions, then MCR 7.123 is meaningless. MCR 7.123(A) states "[t]his rule governs an appeal to the circuit court from an agency decision that is not governed by another rule in this subchapter." SDEIA's argument must be rejected because it would render MCR 7.123 nugatory. *People v Couzens*, 480 Mich 240, 249 (2008) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute."). In fact, appeals of many agency licensing decisions are governed by MCR 7.123, including SDEIA's appeal because DEQ did not conduct a contested case in connection with its issuance of the permit to Severstal.

SDEIA's argument also ignores the plain language of both MCR 7.119 and the APA that demonstrates that MCR 7.119 governs appeals from agency licensing decisions after a contested case, not decisions where there was none. The APA prescribes detailed procedures for how a contested case is to be conducted. *See* MCL 24.271 *et seq.* (establishing contested-case procedures for, among other things, witnesses and exhibits to be presented before an administrative law judge). Importantly, the APA does *not* identify procedures for how an agency is to make a licensing decision where, as in this case, no contested case is authorized by law. Thus, under MCR 7.119(A), an agency licensing decision "where [the APA] applies" (and is therefore governed by MCR 7.119) is an agency decision made after a contested case.

In addition, a comparison of MCR 7.119 and the nearly identical judicial-review provisions of the APA for decisions after contested cases reinforces the conclusion that MCR 7.119 governs an appeal to circuit court following a contested case. For example, Section 104 of the APA provides that an appeal after a contested case must be filed "within 60 days after the date of mailing notice of the order of the agency," or, if there is a rehearing, "within 60 days after delivery or mailing notice of the decision or order thereon." MCL 24.304. MCR 7.119(B)(1) similarly states that judicial review shall be made by filing an appeal in the circuit court "within 60 days after the date of mailing of the notice of the agency's final decision or order," or, if a rehearing is requested, "within 60 days after delivery or mailing of the notice of the agency's decision or order on rehearing[.]" Section 105 of the APA states the

circuit court may order "the taking of additional evidence before the agency[,]" MCL 24.305, and MCR 7.119(G) similarly allows a party to file a motion to allow "the taking of additional evidence before the agency[.]" And just as the APA provides that the circuit court shall set aside an agency decision that is "[n]ot supported by competent material and substantial evidence on the whole record," MCL 24.307(d), MCR 7.119(H) similarly provides for the circuit court to reverse the agency's decision if it is "not supported by competent, material, and substantial evidence on the whole record[.]"

All of these parallel provisions demonstrate that, under MCR 7.119(A), an appeal from an agency licensing decision "where [the APA] applies" means an appeal from an agency licensing decision that was made after a contested case. MCR 7.119 does not govern appeals to circuit court where no contested case occurred.

MCR 7.123, by its plain terms, governs SDEIA's appeal. It "governs an appeal to the circuit court from an agency decision that is not governed by another rule in this subchapter." MCR 7.123(A). There is no rule other than MCR 7.123 that governs appeals where, like DEQ's decision to issue the permit in this case, there was no contested case.

A. The fact that Severstal could have filed a petition for a contested case is irrelevant.

SDEIA claims its appeal to the circuit court is governed by MCR 7.119 because the permittee, Severstal, *could have* filed a petition for a contested case to challenge the permit DEQ issued. (SDEIA Brief, pp 19-24.) According to SDEIA, this case is an appeal of an agency decision to which the APA applies because Severstal had the "*opportunity* for a contested case hearing" that it could have exercised "if Severstal had desired one." (*Id.*, p 21.)

SDEIA ignores the fact that MCR 7.119 governs appeals of agency decisions after contested cases that actually occurred, not hypothetical agency decisions. Under MCR 7.119(A), whether an appeal to the circuit court is from "an agency decision where [the APA] applies," depends on whether there was, in fact, a contested case. Here, there was none. Whether a contested case could have occurred is irrelevant.

III. The Court of Appeals' decision needs to be corrected to ensure that parties do not claim a right to contested cases to challenge future permitting decisions when they have no legal right to one, including permit applications affecting Great Lakes submerged lands.

In its application for leave to appeal, DEQ emphasized that, as a result of the Court of Appeals' clear error, parties in future cases will claim a right to a contested case whenever an agency holds a public hearing on a proposed license when, in fact, the law does not provide an opportunity for a contested case. One of the examples DEQ cited in which it is required to provide a public hearing, but not a contested

case, is a permit application affecting Great Lakes submerged lands. MCL 324.32514. (Application, p 12.)

SDEIA maintains that contested cases are required for permits affecting Great Lakes submerged lands. (SDEIA Brief, p 11.) As support, they note such permits are on a list in MCL 324.1301(d). But that list does not identify permits for which a contested case is required. To the contrary, it provides that, among other things, DEQ must reimburse a permit applicant a portion of their application fee if it fails to process the application within a processing deadline. MCL 324.1307.

This Court should grant leave to ensure the Court of Appeals' decision is not used by parties in future cases to claim a right to a contested case to challenge agency licensing decisions when they have no legal right to one, including agency decisions on permit applications affecting Great Lakes submerged lands,

CONCLUSION AND RELIEF REQUESTED

The clear legal error of the Court of Appeals, if not corrected, will result in parties claiming a right to a contested case where the law does not provide for one, and will require state agencies to expend their limited resources on contested cases for which there is no statutory requirement. In addition, the Court of Appeals' error will result in the circuit courts applying the wrong court rule to appeals from agency decisions where there was a public hearing but no contested case.

The Michigan Department of Environmental Quality respectfully requests that this Court grant its application for leave to appeal and reverse that portion of the Court of Appeals' opinion holding that the contested-case provisions of the Administrative Procedures Act apply to licensing actions that are preceded by notice and opportunity for a public hearing. (Ex 1, pp 5-7.) In the alternative, DEQ asks this Court to peremptorily reverse that portion of the Court of Appeals' opinion and dismiss the case.

Respectfully submitted,

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